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No. 03-1431

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

HOSPITALITY MANAGEMENT ASSOCIATES, INC., *et al.*,
Petitioners,

v.

SHELL OIL COMPANY d/b/a SHELL CHEMICAL COMPANY,
HOECHST CELANESE CORPORATION, and
E. I. DU PONT DE NEMOURS AND COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

BRIEF IN OPPOSITION OF RESPONDENT E. I. DU PONT DE NEMOURS AND COMPANY

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QUESTION PRESENTED

Whether the South Carolina Supreme Court erred in affording full faith and credit to final settlement judgments in two national class actions based on its determination that the due process issues related to the binding effect of the settlements were fully and fairly litigated in, and necessarily decided by, the state courts that approved them.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent E. I. du Pont de Nemours and Company states that it has no parent corporations and that there are no publicly held companies that own more than 10% of its stock.

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BRIEF IN OPPOSITION OF RESPONDENT E. I. DU PONT DE NEMOURS AND COMPANY

INTRODUCTION

Petitioners collaterally attack two national class action settlements approved as final judgments by Alabama and Tennessee state courts. Petitioners did not opt out of the settlements, nor have they pursued claims for recovery under the settlements. Instead, petitioners seek to prosecute a competing nationwide class action in South Carolina, asking the state court to second-guess the earlier determinations by sister state courts that the national class action settlements were proper and that all due process requirements were met.

The Supreme Court of South Carolina rejected that request. After carefully determining that all of the relevant due process issues had been fully and fairly litigated in and resolved

by the settlement courts, the South Carolina Supreme Court granted full faith and credit to the final judgments approving the settlements, and therefore it affirmed the dismissal of petitioners' competing action.

This petition is not an appropriate vehicle for the Court to address the issues raised in *Dow Chemical Co. v. Stephenson*, 539 U.S. 111 (2003), *aff'g by an equally divided Court* 273 F.3d 249 (2d Cir. 2001). Among other reasons, the settlements challenged by petitioners are substantially different from that in *Stephenson*. Moreover, on the merits, the decision of the South Carolina Supreme Court is correct. It is consistent with the decisions of this Court and a long line of cases in both the state and federal courts declining to allow collateral attacks in situations such as the one presented here. For these reasons, the petition should be denied.

COUNTERSTATEMENT

A. Polybutylene Plumbing Litigation Background

Respondents Shell Oil Company ("Shell"), Hoechst Celanese Corporation ("Celanese"), and E. I. du Pont de Nemours and Company ("DuPont") produced raw materials sold to other manufacturers who used those materials to make plumbing components. Shell sold polybutylene resin to manufacturers who extruded it into pipes for use in plumbing systems. Celanese and DuPont sold acetal plastic resin to manufacturers who molded it into fittings used to connect pipes in plumbing systems.

Since the early 1980s, litigation has been brought against various defendants, including respondents and other manufacturers, over polybutylene plumbing systems. Beginning in the mid 1990s, numerous plaintiffs' attorneys filed putative statewide or nationwide class actions, including the instant case, in various jurisdictions throughout the country. Pet. App. 29a.

B. The *Spencer* and *Cox* Settlement Judgments

1. In November 1994, *Spencer v. Shell Oil Co.*, No. CV-94-047 (Cir. Ct., Greene Cty., Ala.), a nationwide class action, was filed against respondents in Alabama state court. In May 1995, DuPont agreed to a national class action settlement in *Spencer*. After a hearing, the Alabama court preliminarily approved that settlement on May 25, 1995.

Under the terms of the *Spencer* settlement as finally approved, DuPont agreed to pay class members 10%[1] of (1) the cost of a replumb occurring within 15 years of installation of a polybutylene system, whether or not the class member suffered any leaks, and (2) the value of physical damage to tangible property caused by a leak occurring within 15 years of installation. Pet. App. 5a, 7a.[2] DuPont agreed to provide at least $120 million to fund these costs. The $120 million figure is a "soft cap"; if the costs of the settlement exceed $120 million, DuPont must choose whether to provide additional funding under the terms of the settlement or to decline to provide such funding. If DuPont declines to provide funding in excess of $120 million, then under the terms of the operative agreements and stipulations "class members who had not been paid would retain all rights against DuPont" (*id.* at 5a), and the settlement operates to toll applicable statutes of limitation from the date the lawsuit was filed until three months after DuPont provides notice declining to provide additional funding.

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[1] DuPont's litigation exposure to possible damages was small relative to that of Shell and Celanese; DuPont sold a smaller quantity of material for this use, in part because its involvement was for a shorter time period.

[2] The settlement actually was more favorable to class members than described by the court below; the 15-year restrictions were not applied to claims submitted within one year of the first class notice. Likewise, the 15-year restrictions were not applied for a period following the supplemental class notices (four and eight years, respectively, after the first notice).

The Alabama court in *Spencer* approved a comprehensive $7.4 million notice program that was designed and coordinated by a professional and highly-qualified firm with "extensive experience in designing and implementing successful, court-approved notice programs in a variety of significant class actions." *Id.* at 48a. The notice program had several components. First, the notice expert coordinated the direct mailing of over 2.5 million notices to individuals, including more than 245,000 notices to South Carolina residents. Second, the notice expert conducted a "massive national media campaign" (*id.* at 22a), including television advertisements on national network and cable broadcasts during soap operas, morning talk shows, evening newscasts, and sporting events. Thirty-second radio advertisements were carried on the ABC Radio Network and the American Urban Radio Network, which have affiliates in South Carolina. The notice program also included an extensive print campaign that targeted national publications, such as *USA Today*, *TV Guide*, *Parade*, and *Jet*, as well as local and regional newspapers throughout the country, including daily, weekly, and monthly newspapers in South Carolina with a combined circulation exceeding 800,000. *Id.* at 49a. Information kits were also mailed to numerous membership organizations with interests related to polybutylene plumbing.[3]

An affidavit submitted to the Alabama court by the consultant who coordinated the notice campaign reported that an independent national media firm estimated that the paid advertising program in its entirety reached 96.6 percent of adults nationwide and that they were exposed to the message an average of 4.9 times. Those numbers were likely even higher in South Carolina, which received more emphasis in the notice campaign. *Id.*

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[3] The notice campaign also included non-paid or "earned media," such as press releases and video news releases. Two supplemental notice programs were conducted in 1999 and 2004.

2. In June 1995, *Cox v. Shell Oil Co.*, No. 18,844 (Tenn. Ch. Ct., Obion Cty.), another nationwide class action, was filed in Tennessee state court against Shell and Celanese (DuPont was not a party). On August 9, 1995, the *Cox* court preliminarily approved a nationwide class settlement. Under the settlement agreement, Shell and Celanese agreed to fund replumbs and physical damage to tangible property of the class members caused by a qualifying leak and to provide $850 million in a "soft cap" fund.[4]

3. *Spencer* class counsel filed objections to the *Cox* settlement in August 1995. Likewise, *Cox* class counsel filed objections to the *Spencer* settlement in October 1995. Shell and Celanese also filed oppositions to the *Spencer* settlement. In October and November 1995, *Cox* and *Spencer* class counsel and respondents participated in a mediation under the auspices of California Circuit Court Judge Robert Silver.[5] After the mediation, some changes were made to the *Cox* settlement, including an increase in the initial funding to $950 million. Judge Silver noted that "[b]efore I would agree to recommend the settlement, it would have to meet a class fairness standard. . . . I set my own standards of fairness for the class and acted as a buffer against any claim that the class would suffer on account of fees." Pet. App. 57a.

4. The Alabama court conducted a fairness hearing on the *Spencer* settlement and gave it final approval on November 17, 1995. The Alabama court found that the *Spencer*

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[4] Because of the soft cap, the value of the settlement to class members is much higher than the $150 asserted by petitioners. Pet. 6. Each class member receives the full cost of a replumb and any damages to tangible property as a result of a leak—amounts far in excess of $150 per unit. And, the soft cap means the fund amount ultimately could be much higher than the initially agreed-upon figure.

[5] Judge Silver was presiding over yet another putative statewide class action in California. The *Cox* and *Spencer* courts were aware of Judge Silver's mediation efforts. Pet. App. 31a.

settlement agreement was "fair, adequate, and reasonable to the Plaintiffs." App. 16a-17a.

With respect to the adequacy of notice to the class—which the court recognized was a due process prerequisite for the settlement to have binding effect on absent plaintiffs—the *Spencer* court specifically held that "the means of disseminating the notice was the best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the Action and their rights therein." *Id.* at 17a. It also held that the notice "fairly and accurately described the pending Action" and "advised the class members of their right to enter an appearance through counsel and the right to object to the DuPont settlement." *Id.* Finally, the *Spencer* court fully considered and overruled objections about inadequate representation, specifically holding that "[u]nquestionably, Plaintiffs are represented by qualified and competent counsel who will vigorously prosecute this action" (*id.* at 8a), and that the class representatives would "fairly and adequately represent and protect the interests of all class members, and not put any perceived individual interests above those of the class." *Id.* at 10a.

5. The Tennessee court likewise conducted a fairness hearing on the *Cox* settlement and gave it final approval on November 17, 1995, noting it included "a singularly comprehensive and creative notice program." Pet. App. 19a. The court characterized it as providing the best notice practicable under the circumstances, and specifically ruled that it "met and exceeded" minimum due process requirements. *Id.* at 21a-22a. With respect to adequacy of representation, the court held that "*Cox* class counsel maintained the highest standards of professionalism and advocacy in protecting and promoting the interests of the Class throughout the prosecution and settlement of this case." *Id.* at 59a.

C. The Proceedings Below

The instant case was filed in the Court of Common Pleas in Charleston, South Carolina on May 30, 1995, five days after the *Spencer* court had preliminarily approved DuPont's settlement. On August 17, 1995, the six original plaintiffs were joined by two potential intervenors. On February 2, 1996, the original plaintiffs (who had not yet moved for class certification), each of whom had opted out of the *Cox* and *Spencer* settlements, reached individual settlements with respondents and agreed to dismiss their claims with prejudice. The original intervenors also entered settlements.

On March 27, 1996, less than two hours before the clerk signed an order of dismissal, petitioners' counsel filed a motion to intervene in the case on behalf of new intervenors and a putative class. The trial court ultimately granted the motion to intervene on behalf of this competing putative class. Like the class representatives in *Cox* and *Spencer*, petitioners described themselves as "owners of structures containing polybutylene plumbing systems." Pet. 3. None of the petitioners opted out of, or made claims for recovery under, the *Cox* or *Spencer* settlements.

The sole basis petitioners offered the trial court in this case for ignoring the *Cox* and *Spencer* judgments was that those courts did not afford due process to absent class members. Petitioners argued that the trial court here had authority to conduct a complete *de novo* review of the evidence presented to the *Cox* and *Spencer* courts—including a comprehensive factual evaluation of the sufficiency of the evidence—to make its own determination of the adequacy of the courts' due process rulings on issues such as notice and adequacy of representation.

On January 14, 2002, the trial court granted respondents' summary judgment motions and dismissed the case on the basis of the Full Faith and Credit Clause. The court ruled

that petitioners were bound by the prior settlements and rejected petitioners' arguments that the South Carolina courts were entitled to disregard the findings and determinations of the courts of sister states. The trial court concluded that it was not allowed "to examine *de novo* or undertake such broad collateral review of another state court's judgment before according it full faith and credit." Pet. App. 42a. The court then determined that "[t]he record unmistakably shows that the [*Cox* and *Spencer*] courts fully considered all due process issues relating to its jurisdiction over absent class members." *Id.*

On January 12, 2004, the South Carolina Supreme Court affirmed, holding that:

> [D]ue process requires that an absent class member's rights are protected by the adoption and utilization of appropriate procedures by the certifying court; thereafter, the merits of the certifying court's determinations are subject to direct appellate review. As for collateral review, however, due process does not afford any "second-guessing of those determinations."

Id. at 18a (quoting *Epstein v. MCA, Inc.*, 179 F.3d 641, 648 (9th Cir.) *cert. denied*, 528 U.S. 1004 (1999)).

The South Carolina Supreme Court concluded that it was not to consider *de novo* whether, for example, the rendering court had provided adequate notice to absent class members. Rather, it held that its role was to determine whether the rendering court had itself properly considered the issue and had done so in a manner that comported with due process.[6] *Id.*

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[6] Similarly, other courts have rejected collateral challenges to the *res judicata* effect of the *Cox* and *Spencer* settlements, according them full faith and credit. *See Hop v. Hoechst Celanese Corp.*, No. 4390 (Wis. Cir. Ct. Mar. 28, 1996); *Fry v. Hoechst Celanese Corp.*, No. 96-2615 (Fla. 5th

REASONS FOR DENYING THE PETITION

This case does not require this Court's review. Contrary to petitioners' suggestions (Pet. 3), this case does not present the Court with an opportunity to address *Stephenson*. *Stephenson* involved a class action settlement with an unidentifiable group of class members whose future claims were extinguished by the settlement but who were denied recovery under it. Thus, *Stephenson*—unlike this case—starkly presented the question whether a class action settlement that would be reversed on direct appeal under *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), was nonetheless entitled to full faith and credit in a collateral attack. That question is not presented here, for the *Spencer* and *Cox* settlements do not suffer from the flaws identified in *Amchem* or the other problems alleged in *Stephenson*, and the petitioners are not future claimants whose rights were extinguished, but rather present claimants who chose not to participate in the settlement. Thus, the Court should await a more appropriate vehicle for resolving the issues presented by *Stephenson*.[7]

In any event, petitioners are bound by the prior settlements because the issues they sought to raise in the South Carolina state courts were determined by the courts that approved the settlements in the first instance. The proper place for petitioners to raise these objections was not in a new court—which would be put in the untoward position of second-

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Dist. App. Oct. 10, 1997); *Farr v. RCP Invs.*, No. CV 93-08807 (Ariz. Sup. Ct. Jan. 29, 1996).

[7] Furthermore, if the Court were to grant this petition, it might face the prospect of devoting considerable time and resources to a case that could end with an evenly divided Court. Justice O'Connor has regularly recused herself from cases in which DuPont was a party. *See, e.g., Green Leaf Nursery, Inc. v. E. I. du Pont de Nemours & Co.*, 124 S. Ct. 2094 (2004); *Minus v. E. I. du Pont de Nemours & Co.*, 537 U.S. 1226 (2003); *Stafford v. E. I. du Pont de Nemours & Co.*, 537 U.S. 941 (2002).

guessing the determinations of the courts originally rendering judgment—but rather in the rendering courts themselves. As the court below concluded, under petitioners' proposed approach, "a nationwide class action could be vulnerable to collateral actions in the 49 other states in which it was not litigated initially," and this would clearly undermine the interests of finality and constitute "a waste of judicial resources." Pet. App. 16a-17a. Contrary to sound judicial administration, it also would frustrate the ability of parties to enter into binding and conclusive settlements of large class actions, thus requiring unnecessary litigation at great cost to the litigants, the courts, and ultimately the public. And all of this would undermine the very purpose of full faith and credit (and the associated doctrine of *res judicata*): to ensure finality of judgments, including, of course, judgments implementing settlements.

I. THIS CASE IS NOT A SUITABLE VEHICLE TO RESOLVE THE QUESTIONS PRESENTED BY *DOW CHEMICAL CO. v. STEPHENSON.*

Petitioners suggest that this case presents the Court with an opportunity to resolve what they claim is a conflict among the federal circuits and state courts of last resort regarding the extent of collateral review upon a challenge by absent, out-of-state class members to a state-court class action settlement. Pet. 3. Specifically, petitioners assert (*id.* at 2-3, 9) a conflict between the court below and the Ninth Circuit in *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir.), *cert. denied*, 528 U.S. 1004 (1999), on the one hand, and *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2d Cir. 2001), *aff'd by an equally divided Court*, 539 U.S. 511 (2003), and *State v. Homeside Lending, Inc.*, 826 A.2d 997 (Vt. 2003), on the other.[8] Petitioners are wrong. This case does not provide

[8] Petitioners also assert (Pet. 2) that the decision below conflicts with *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). But *Amchem*

the Court with a viable opportunity to resolve the issues left unresolved as a result of the evenly divided Court in *Stephenson*.

1. As shown below, the reasons present in *Stephenson* for granting certiorari are not present here. *Stephenson* must be understood in its context. In 1984, a class settlement had been reached in litigation filed against manufacturers of Agent Orange that purported to resolve all Agent Orange claims and created a compensation program that paid claimants for the next ten years, and pursuant to which no payment would be made for death or disability occurring after December 31, 1994. As part of the settlement, all class members—defined to include all persons exposed to Agent Orange, whether or not sick at the time—released their claims against the defendants. *Stephenson*, 273 F.3d at 252-53.

The claims at issue in *Stephenson* were filed in the late 1990s by Vietnam veterans alleging injuries from exposure to Agent Orange. *Id.* at 255. Their injuries manifested themselves only after the ten-year compensation program under the prior class settlement had ended, and therefore they could not recover under that settlement. *Id.* Defendants moved to dismiss the plaintiffs' claims on the grounds that they were barred by the 1984 class settlement, and the trial court

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was a case heard on *direct appeal* of a class action settlement—not, as here, a collateral attack—and *Amchem* therefore neither resolved nor even discussed whether it applied retroactively in a collateral proceeding. Moreover, *Amchem* involved an interpretation of Fed. R. Civ. P. 23, which as noted below (*infra*, at 15-16) is not binding on the proper interpretation of Alabama's and Tennessee's class action rule. Indeed, the Court in *Amchem* expressly reserved the constitutional issue of the adequacy of the class action procedure applied in that case. *See* 521 U.S. at 628. For these reasons, *Amchem* does not state a constitutional rule applicable in this case. In any event, whether the decision below is in accord with the principle now established in *Amchem* involves a fact-bound question about which petitioners seek mere correction of error.

granted defendants' motion. Plaintiffs appealed, contending that they were inadequately represented in the class action.

The Second Circuit reversed, resting its decision on the fact that the district court, in certifying a settlement class, had not addressed the adequacy of representation for those members of the class, including the *Stephenson* plaintiffs, whose injuries manifested themselves only after the depletion of the settlement fund but whose claims nonetheless were extinguished. *Id.* at 257-58. In other words, the fatal flaw in the settlement, according to the Second Circuit, was its failure (under *Amchem*) to provide adequate representation to a subclass of unidentifiable class members without present injuries who received no benefit from the settlement, because their future injuries occurred after payments ended, but whose claims nevertheless were released by the settlement. *Id.* Given the marked conflict between the interests of current and future claimants, the adequacy of class representation as to the *Stephenson* plaintiffs, in the Second Circuit's view, could not have been "fully and fairly" litigated in the settlement court. *See id.*

This Court subsequently granted certiorari to address the question of the *res judicata* effect of the prior settlement in these unique circumstances. The Court ultimately affirmed by an equally divided vote. *See Dow Chemical Co. v. Stephenson*, 539 U.S. 111 (2003).

Contrary to petitioners' suggestion (Pet. 3), the petition here does not provide the Court with an opportunity to resolve the legal issue left open in *Stephenson*.

First, this Court faced in *Stephenson* a class action settlement that exhibited the very flaw previously identified in *Amchem*, 521 U.S. at 626-28. As the Court explained, "it is obvious after *Amchem* that a class divided between holders of present and future claims . . . requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate

representation to eliminate conflicting interests of counsel." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999). The Agent Orange settlement plainly failed under the *Amchem* standard. This Court, therefore, was squarely presented with the question of whether a class settlement that would be reversed on direct appeal under *Amchem* should nonetheless be accorded full faith and credit in a collateral attack.

The *Amchem* flaw, however, is not present in the *Cox* and *Spencer* settlements. In contrast to *Stephenson*, the *Cox* and *Spencer* settlements do not cut off the claims of future claimants while assuring recovery for current claimants. Instead, both settlements have "soft caps" that either require respondents to continue funding for future claims above the cap (thus compensating injured claimants) or allow future claimants later to initiate their own suit (pursuant to a waiver of the statute of limitations). Both settlements also provide the same payments for claims whether made in 1995 when settlement funding began or at some future time. Indeed, class members can recover under the *Spencer* settlement whether or not they have suffered any leaks or other injury. Where present and future claimants will receive the same benefits (or, if they do not, their claims—which have been tolled—will survive intact), there is no conflict between current and future claimants of the kind at issue in *Stephenson*.[9] For all these reasons, this case does not provide the Court with an opportunity to resolve the legal questions presented by *Stephenson*.[10]

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[9] Petitioners' assertion (Pet. 27) that some class members were unaware that they owned polybutylene pipes, and that they were therefore inadequately represented, is unavailing. The presence of polybutylene pipes can be determined readily, and all class members were eligible immediately for recovery under the *Spencer* settlement, whether or not they suffered a leak or failure resulting in property damage.

[10] Petitioners' generalized claims of inadequate representation (Pet. 24-29) do not implicate the issues in *Stephenson*. And petitioners' arguments

Second, this case more closely resembles the Second Circuit's earlier decision in *In re "Agent Orange" Products Liability Litigation*, 996 F.2d 1425 (2d Cir. 1993) *cert. denied*, 510 U.S. 1140 (1994) ("*Ivy/Hartman II*"), than *Stephenson*. As noted above, the plaintiffs in *Stephenson* became ill only *after* expiration of the 10-year payment period and received no recovery under the settlement. By contrast, the *Cox* and *Spencer* settlements include soft caps that ensure that funds will be available to all claimants or that their claims will otherwise be preserved. Moreover, the *Spencer* settlement entitles petitioners to make claims for a 15-year period

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are unavailing in any event. First, petitioners complain (Pet. 5, 25-26, 27) that class counsel withdrew their objections to the *Cox* settlement in exchange for the payment of additional attorneys' fees. Neither Judge Silver (who conducted a mediation regarding the settlements), the *Cox* and *Spencer* courts, the trial court in the instant case, the South Carolina Supreme Court, nor any other court evaluating the *Cox* and *Spencer* judgments, found this distribution of fees objectionable or inappropriate. Second, petitioners suggest (Pet. 6, 24, 29) that one class attorney inappropriately settled a private inventory of claims at amounts purportedly greater than class members received. But the *Cox* court specifically rejected the argument that petitioners now advance, ruling that "[t]here is no factual basis for the asserted objection that settlements in individual cases are improperly disparate from the *Cox* settlement." Pet. App. 59a n.10. Judge Silver likewise addressed these concerns, noting that he was "particularly sensitive" to the issue of individual settlements during negotiations and that he would not allow the subject of individual settlements to enter into negotiations. In particular, Judge Silver stated that "in no way would I permit [the attorney representing individual plaintiffs], nor did he ever try, to condition class settlement on his settlement." Pet. App. 58a-59a n.10. In *Amchem*, by contrast, the parties explicitly linked settlement of class and individual claims. 521 U.S. at 600-01. Finally, petitioners' complaint (Pet. 25-26) that homeowner class representatives could not provide adequate representation for commercial business is unfounded, and at any rate unlike the inherent structural flaws found in *Stephenson*. The *Spencer* settlement pays the same 10% of a replumb and damage caused by leaks, whether the property at issue is a home or a commercial business, and whether the cost of the replumb is $2,000 or $200,000.

after installation. Petitioners have not asserted—either here or below—that they do not fall within this 15-year window.[11] Thus, petitioners are not in the same situation as the plaintiffs in *Stephenson*. Rather, their position is akin to that of the plaintiffs in *Ivy/Hartman II*, whose Agent Orange-related injuries became apparent during the 10-year settlement period. In contrast to its holding in *Stephenson*, the Second Circuit *rejected* the collateral attack by the *Ivy/Hartman II* plaintiffs, holding that it was unnecessary to create a subclass of future claimants who became ill within 10 years after the settlement, precisely because the settlement covered such claims. *Ivy/Hartman II*, 996 F.2d at 1436. In *Stephenson*, the Second Circuit reaffirmed its holding in *Ivy/Hartman II*. *See Stephenson*, 273 F.3d at 257-58, 260 n.7. Thus, the Second Circuit would accord full faith and credit to the *Spencer* and *Cox* settlements under *Ivy/Hartman II*. For this reason, petitioners err in claiming that the Second Circuit is in conflict with the decision below on the facts of this case. Pet. 2.

Third, this case does not present the *Stephenson* issues for a more fundamental reason. The class-action settlement collaterally attacked in *Stephenson*, like that challenged on direct review in *Amchem*, was approved in federal court subject to Fed. R. Civ. P. 23. The holding in *Amchem* was based not on the Constitution but on the Court's interpretation of Fed. R. Civ. P. 23. Indeed, in *Amchem*, this Court specifically reserved the only constitutional question presented—whether notice to the class was constitutionally deficient. *See* 521 U.S. at 628. Thus, the *Amchem* holding was *not* binding on the *Spencer* and *Cox* settlement courts interpreting the state class action procedural rules; more to the point, it is not relevant to the South Carolina courts' application of full faith

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[11] Moreover, Delrin® was not sold for use in these plumbing fittings until 1983, and petitioners intervened in the instant case in 1996. Therefore, petitioners' claims necessarily fell within the 15-year window at the time petitioners intervened in this case.

and credit and due process principles to the *Spencer* and *Cox* judgments. In order for the Court even to address the full faith and credit issues present in *Stephenson* and asserted by petitioners, the Court first would be required to decide the constitutional question reserved in *Amchem*, and then determine whether any constitutional violation it identified could be asserted retroactively in a collateral attack of a class action judgment. Given the absence of direct constitutional authority, the Court would also be faced with the question whether the full faith and credit standard for collateral attack varied depending on whether the constitutional violation in the prior judgment was established by previous decision or would be a new rule of constitutional law. *Cf. Teague v. Lane*, 489 U.S. 288 (1989). These complex legal issues were neither raised in the petition nor passed on by the South Carolina Supreme Court. Nor does the petition suggest they are ripe for this Court's review. Accordingly, this case is not an appropriate vehicle for the Court to try to reach the *Stephenson* issue.

2. Petitioners' reliance on *State v. Homeside Lending, Inc.*, 826 A.2d 997 (Vt. 2003), as establishing a division in authority (Pet. 9) also is unavailing. Indeed, the Vermont Supreme Court expressly found it unnecessary to reach the issue of the proper scope of review for a collateral attack on a class action settlement (*Homeside Lending*, 826 A.2d at 1017)—exactly the question petitioners seek to raise here.

The Vermont Supreme Court described the settlement considered in *Homeside Lending* as "notorious." *Id.* at 999. The specific facts presented there made it easy to find that the settlement could not be given full faith and credit. Although not clear from the class notice of the settlement, and certainly not considered or known by the court that approved the settlement, many class members ended up paying more to their purported class counsel by way of attorneys' fees than they received by way of benefits. *See id.* at 1002 n.4. In other words, class members took a net loss—a position that clearly

put class counsel at odds with the class they purported to represent. This result was hidden from the settlement court and the recipients of the class notice. *Id.* at 1010-12.

The Vermont Supreme Court noted that when a settlement takes away, rather than grants, net benefits, the liberalized standards for judging adequate notice and proper representation associated with a *plaintiff* class (under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985)) do not apply. As the court observed, "the position of many of the class plaintiffs was closer to the defendant as described in the *Shutts* opinion." *Homeside Lending*, 826 A.2d at 1008; *see also id.* at 1011 ("absent class members were actually in a defendant class"). Accordingly, the more rigorous due process standards associated with imposing liability on a defendant, *see Shutts*, 472 U.S. at 808, were necessary.

Moreover, the class representatives in *Homeside Lending* did not suffer the same net loss as the rest of the class members, because their recovery was enhanced through incentive payments. The appellate court stated it could "think of no more compelling example of inadequate representation," because "[t]he normal conflict of interest of class counsel with respect to fees was allowed to take away most or all of the economic benefit of the litigation for class members."[12]

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[12] Petitioners' claim that *Cox* and *Spencer* involved a similar conflict over attorneys' fees between the class and class counsel, allegedly because "[t]he funding for the extra attorneys' fees came from the reduction in class proceeds" (Pet. 5-6, 28), is baseless. Because of the "soft caps," there is no limit on the funding available to satisfy the claims of class members, and nothing was taken away from class members and given to their attorneys. Petitioners' assertion that the *Cox* and *Spencer* settlements deserve a more searching review because (as in *Homeside Lending*) defendants supposedly participated in the actions of class counsel that are alleged to be inadequate representation (Pet. 16-17) also springs from this baseless claim (which is refuted in detail in footnote 10, *supra*). Further, because petitioners did not raise this argument below, it is not properly presented here.

Homeside Lending, 826 A.2d at 1016. It was in these circumstances that the Vermont court found that it was unnecessary to determine the proper scope of review for a collateral attack on a class settlement. *See id.* at 1017. Because *Homeside Lending* bears no similarity to this case—there has been no suggestion of a net loss to any class members here as a result of the settlements—there is no conflict between the court below and the Vermont court.

3. In any event, petitioners have overstated significantly the degree of tension between the Second Circuit and the Vermont court, on the one hand, and the Ninth Circuit and the court below, on the other. The most that can be said accurately about *Stephenson* and *Homeside Lending* is that they provide some further elaboration beyond *Epstein* of the controlling standard where there are unique circumstances not present here. Notably, neither case applies any standard different from that applied in *Epstein*, and neither court rejected the *Epstein* standard. Indeed, in each case the court found that the particular judgment before it would not be entitled to *res judicata* effect even under the Ninth Circuit's standards. *See Stephenson*, 273 F.3d at 258 n.6 ("Without adopting the Ninth Circuit's decision in *Epstein*, we conclude that plaintiffs' collateral attack is proper even under its standard."); *Homeside Lending*, 826 A.2d at 1016-17 (concluding that the Ninth Circuit would have denied full faith and credit under *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992)).

II. THE SOUTH CAROLINA SUPREME COURT PROPERLY ACCORDED FULL FAITH AND CREDIT TO THE *COX* AND *SPENCER* JUDGMENTS.

Petitioners also are wrong in arguing that the South Carolina Supreme Court erred in according the *Cox* and *Spencer* settlement judgments full faith and credit. Pet. 2. Under settled precedents of this Court, when a previous state-

court class action settlement is collaterally attacked, the reviewing court is not required to review *de novo* the due process analysis of the settlement court. In any event, no matter what standard is applied, the *Cox* and *Spencer* settlements readily satisfy due process.

A. Due Process Does Not Require A State Court's Full Faith And Credit Analysis To Include *De Novo* Review Of The Due Process Inquiry Conducted By The Settlement Court.

This Court's cases have clearly delineated the due process analysis that a settlement court must conduct in order to validate a nationwide class action settlement capable of binding absent class members without actual notice of the action. *See Shutts*, 472 U.S. at 811-12. That analysis requires an inquiry into the facts and circumstances of a particular case and settlement to determine, for example, whether the notice given was reasonable and the best practicable, or whether more was required. In addition, the court must exercise judgment in determining whether the interests of absent class members were adequately represented by those parties participating in the lawsuit. The trial court's evaluation of such matters is clearly subject to scrutiny on direct appeal, and ultimately to review by this Court on certiorari.

Petitioners contend, however, that a different court, asked to consider whether the prior judgment and settlement should be given *res judicata* effect in a subsequent suit, ought to consider *de novo* issues such as the adequacy of notice or representation. Pet. 16-17. Under petitioners' theory, notwithstanding that the settlement court conducted its own inquiry according to the standards set by this Court, a second court is free to ignore or "second-guess," *Epstein*, 179 F.3d at 648, the settlement court's approach and conclusions. In petitioners' view, the fact that the record establishes that the settlement court considered and evaluated the due process issues, and applied the proper analysis (drawn from this

Court's cases), should not prevent a subsequent court from considering these issues anew and drawing a different conclusion if it sees fit.

Petitioners' approach would have devastating and far-reaching implications. Where a due process issue is properly raised in the original proceeding, the presiding court has the opportunity to address and correct any problem. Where the issue is raised only in a subsequent proceeding, the settlement court no longer has the ability to make any correction. The second court's only option is to deny effect to the prior judgment, and thus destroy the fundamental benefit for which the defendant bargained—peace and finality.[13] Moreover, upon denying effect to the earlier settlement, the second court is apparently free to proceed with its own class action, according to its own standards, potentially exposing the defendant to massive additional liability.

Petitioners' theory has not been accepted by any court. To the contrary, as explained above, the two cases cited by petitioners involved unique circumstances and distinct legal concerns that have no bearing here. As recognized by the South Carolina Supreme Court in this case, following a thorough analysis of the decisions on the issue, a collateral attack on a prior judgment or settlement is limited to the assertion that the settlement court did not provide adequate procedures for addressing the due process issues:

> As for collateral review, however, due process does not afford any "second-guessing of those determinations." Instead, what this limited review entails is "an examination of *procedural* due process and nothing more."

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[13] It is not only defendants, but also class members, who would be adversely affected were petitioners' arguments adopted. For example, DuPont's obligations under the *Spencer* settlement are terminated *for all class members*, not just petitioners here, if the settlement is denied preclusive effect.

Pet. App. 18a (citations omitted) (emphasis in original); *see also Reppert v. Marvin Lumber & Cedar Co.*, 359 F.3d 53, 57 (1st Cir. 2004) (relying on whether "[t]he [settlement] court found that the notice procedures met the requirements of the applicable Minnesota Rule of Civil Procedure and comported with due process requirements"); *Epstein*, 179 F.3d at 648 ("[d]ue process requires that an absent class member's right to adequate representation be protected by the adoption of the appropriate procedures by the certifying court"); *Fine v. Am. Online, Inc.*, 743 N.E.2d 416, 420 (Ohio Ct. App. 2000) ("[m]odern constitutional jurisprudence requires that the absent class members' rights to due process be protected not by substantive collateral review, but rather, by the application of appropriate procedures in the certifying court"). Under the cases, the question is whether the settlement court was attentive to the procedures concerning class notice and representation, not whether the second court would resolve those issues in the same way as the settlement court.

In developing these principles, the lower courts have closely adhered to principles set forth in this Court's cases. This Court has long held, for example, that:

> a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.

Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691, 706 (1982). The Court elaborated on these principles in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481 (1982), explaining that in order for its judgment to be entitled to full faith and credit, a state court "need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause." Full faith and credit is accorded unless "there is reason to doubt the quality, extensiveness, or

fairness of *procedures* followed in prior litigation." *Id.* at 481 (quoting *Montana v. United States*, 440 U.S. 147, 164 n.11 (1979)) (emphasis added). Thus, as long as the reviewing court is satisfied that the state court had in place and adhered to procedures to protect the parties' due process rights, the state court's judgment is binding in other courts and not subject to collateral attack. Both *Underwriters* and *Kremer* rejected the type of *de novo* factual review that petitioners urge here.

In *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996), this Court applied these principles to a class action settlement. The Court noted at the outset that "a judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is presumptively entitled to full faith and credit under the express terms of the Act." *Id.* at 374. In reversing a contrary ruling by the Ninth Circuit, this Court did *not* engage in a *de novo* review of the facts before the settlement court to determine whether due process had been afforded absent class members. Rather, *Matsushita*'s holding was "explicitly and implicitly premised upon the validity of the Delaware judgment." *Epstein*, 179 F.3d at 644. Thus, in *Matsushita*, this Court highlighted that the Delaware Court of Chancery had made an "express ruling, following argument on the issue, that the class representatives fairly and adequately protected the interests of the class," and that "the Court of Chancery found, and the Delaware Supreme Court affirmed" that the requirements of due process were satisfied. *Matsushita*, 516 U.S. at 378-79 & n.5. On remand from that decision, the Ninth Circuit recognized this Court's direction that absent members' due process rights are "protected by the adoption of the appropriate procedures by the certifying court and by the courts that review its determinations" rather than by "collateral second-guessing of those determinations and that review." *Epstein*, 179 F.3d at 648.

The same reasoning employed by the Ninth Circuit in *Epstein* (on remand from *Matsushita*) has been utilized by other courts asked to give *res judicata* effect to a prior class settlement.[14] It was likewise followed in this case by the South Carolina Supreme Court.

Petitioners' critique of the approach taken below (including adoption of the *Epstein* analysis) (Pet. 16-17) is misdirected. For the most part, petitioners lose sight of the issue that they present for review by relying on cases involving direct review of a settlement. *See* Pet. 3, 11-12, 23-24 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999)).

Petitioners assert that "[t]he only reasonable avenue for an absent class member to test whether due process has been accorded is through collateral attack." Pet. 2-3. In so asserting, petitioners ignore the most direct avenue available for considering objections to a class action settlement—direct recourse to the court rendering the judgment, followed by direct appellate review, and, if necessary, a petition to this Court.[15] The failure to appear in the original action cannot serve as a basis for mounting a collateral challenge to that action. As this Court stated in *Kremer*, "[t]he fact that [peti-

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[14] *See, e.g., Reppert*, 359 F.3d at 57; *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1560-61 (3d Cir. 1994); *Thompson v. Edward D. Jones & Co.*, 992 F.2d 187, 191 (8th Cir. 1993); *Peters v. Nat'l R.R. Passenger Corp.*, 966 F.2d 1483, 1486 (D.C. Cir. 1992); *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 32-33 (1st Cir. 1991); *King v. S. Cent. Bell Tel. & Tel. Co.*, 790 F.2d 524, 529-30 (6th Cir. 1986); *Epstein v. Matsushita Elec. Indus. Co. (In re MCA, Inc. Shareholder Litig.)*, 785 A.2d 625, 628 (Del. 2001), *cert. denied*, 535 U.S. 1017 (2002); *Fine*, 743 N.E.2d at 420-21.

[15] Moreover, as explained *infra*, these principles apply even with respect to absent class members who did not receive actual notice of the settlement.

tioner] failed to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy." 456 U.S. at 485. And, as the Court said in *Hansberry v. Lee*, 311 U.S. 32, 42 (1940), "there has been a failure of due process only in those cases where it cannot be said that *the procedure adopted* fairly insures the protection of the interests of absent parties who are to be bound by it." (Emphasis added).

Precisely because the relevant issues can be addressed in the settlement court, the ordinary and proper way to review a determination that affects one's rights is by presenting one's objections in that court. So long as the settlement court took steps to determine that notice was provided in a manner that satisfies due process standards, and that the interests of the absent party were fairly represented by those who were before the court as class representatives (or as objectors), an absent party has no right to mount a collateral attack on the judgment. Indeed, in the class action setting, the court may properly rely on those parties who do appear in the action, and who act as representatives or objectors, precisely because the commonality of interests—which must be assessed by the settlement court—provides the assurance that all legitimate interests have been addressed and accommodated.

Petitioners also err in asserting that the Supreme Court of South Carolina improperly relied on mere "recitals" or "conclusory recitals" in *Cox* and *Spencer* that the class was provided with adequate notice and representation. Pet. 13-14, 22, 25. Petitioners' characterization of the other courts' efforts as "recitals" does not accurately reflect either the scope of the inquiry conducted by the *Cox* and *Spencer* courts or the decision of the court below. As demonstrated above, both the *Cox* and *Spencer* courts fully considered the questions of notice and representation under applicable constitutional principles. Moreover, the South Carolina Supreme Court and the trial court looked beyond the words used by the

settlement courts for actual use of appropriate procedures in *Cox* and *Spencer*. Pet. App. 19a-22a, 25a-26a, 46a-50a, 42a-55a, 57a-60a. Thus, even in the event that a more searching inquiry were required upon a clear showing that a settlement court acted merely as a rubber stamp, that was not the case here. The settlement courts understood the nature of the due process requirements, the notice provided was extensive and well-considered, and the courts (and parties) were attentive to and met the due process requirements.

B. Even If Petitioners Did Not Receive Actual Notice of the *Cox* and *Spencer* Class Settlements, They Are Bound By The Judgments In Those Cases.

Much of petitioners' argument hinges on the notion that because they purportedly did not receive actual notice of, and did not appear in, *Cox* and *Spencer*, they should not be bound by those settlements and judgments.[16] Pet. 13, 15, 22. This is incorrect under this Court's precedents. Actual notice is *not* required to bind class members to a class action judgment.

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), this Court explained that actual notice is not required in every instance. To the contrary, what due process requires is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of

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[16] Among other reasons, petitioners claim that notice was deficient because it was not targeted to owners of multi-unit complexes. Pet. 6. To the contrary, the notice program included targeted mailings to numerous multi-unit membership organizations, as well as industry publications. Petitioners also assert that notice should have been sent to individuals listed in the database maintained by the Plumbing Claims Group ("PCG"), which is an entity organized and funded by Shell, Celanese and DuPont to resolve claims of property owners outside of litigation. Pet. 6, 21, 22. But the PCG database contained individuals whose claims had *already* been made and addressed by respondents (many of whom had signed releases in favor of respondents).

the action and afford them an opportunity to present their objections." *Id.* at 314. *Mullane* and its progeny established that due process requires no more than notice that is reasonable and appropriate given "the practicalities and peculiarities of the case."[17] *Id.*

The *essence* of the modern class action is the ability to bind absent class members, provided that due process requirements are satisfied. *See Shutts*, 472 U.S. at 811-12 (state court may exercise jurisdiction over non-resident members of plaintiff class as long as the court provides minimal procedural due process protection in the form of notice, an opportunity to be heard and participate, and a right to opt out from the class); *see also Hansberry*, 311 U.S. at 40-41 (class action is exception to the rule that one cannot be bound by judgment *in personam* in a litigation unless one was made a party in the traditional sense).

Indeed, *Shutts* makes clear that the due process standard for reasonable notice varies depending on whether such notice is provided to plaintiffs or defendants. *Shutts*, 472 U.S. at 811. In determining the extent of the required efforts to notify absent class members, the Due Process Clause permits courts to take cognizance of the fact that the very basis for the development of the class action device is to provide a recovery to potential plaintiffs when individual suits on the same claims are not economically feasible or desirable (from class members' own perspective). *Id.* at 813. In contrast, due process requires more rigorous notice efforts in order to bind defen-

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[17] In many class actions, not all of the absent class members can be identified or located. *Cf. Mullane*, 339 U.S. at 317 ("in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights"). In others, the overwhelming cost of notifying each and every theoretically identifiable class member would not be reasonable in light of the nature and financial dimension of the dispute.

dants, who will not benefit from, but rather will be financially impaired by, the prosecution of a suit. *Id.* at 808.

The nature of a class action assumes that actual notice will not be received by some potential parties in interest. Yet the premise of the class action is that those parties who are not reached by notice, and who do not appear in the action, share common interests with those who do appear, either as class representatives or otherwise. Therefore, even if notice does not reach particular individuals, many others, with virtually identical interests and incentives (as determined by the court), will have received actual notice. Thus, the interests of those parties who did not receive notice will be represented pursuant to a procedure superintended by the courts. It is only in those circumstances, typified by *Amchem*, where some definable subclass is unidentifiable and therefore cannot receive notice, cannot participate in the case, and cannot fairly be represented that due process questions may arise. As explained *supra*, that is not the situation here.

For this reason, petitioners' reliance on *Shutts* for their suggestion that every class member must receive individual notice in order to be bound by a class settlement is wholly misplaced. Pet. 17. *Shutts* echoes the principles set forth in *Mullane* that notice must be the best practicable and be reasonably calculated to inform class members of the pendency of the class action. Individual notice was required in *Shutts* only because the identities of all of the class members—royalty owners possessing rights to leases from which the defendant produced natural gas—were known to the settling defendant. *Shutts*, 472 U.S. at 801.

Finally, petitioners rely on cases like *Martin v. Wilks*, 490 U.S. 755 (1989), *Richards v. Jefferson County*, 517 U.S. 793 (1996), and *Local Number 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986), for the suggestion that prior class actions will not bind certain individuals. Pet. 11. That is even wider of the mark. Those

cases reflect the elementary proposition that to be bound by a class action, one must be a member of the class. Here, by contrast, it is undisputed that petitioners were members of the *Cox* and *Spencer* classes. These cases, therefore, simply are inapposite.

CONCLUSION

For the foregoing reasons, the petition does not present any issues requiring this Court's review. Accordingly, the petition should be denied.

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June 17, 2004

APPENDICES

APPENDIX A

IN THE CIRCUIT COURT OF
GREENE COUNTY, ALABAMA

[Filed Jun. 30, 1995]

Civil Action No. CV-94-074

GARRIA SPENCER, *et al.*,
Plaintiffs,

v.

SHELL OIL COMPANY, *et al.*,
Defendants.

ORDER OF CLASS CERTIFICATION

Plaintiffs have moved for an order pursuant to Rule 23, Alabama Rules of Civil Procedure, that this case may be maintained and certified a class action. On June 19, 1995, the Court heard extensive argument from the parties' counsel and admitted into evidence the parties' evidentiary submissions. The Court finds that there is sufficient proof in the record making it practicable for the Court to rule upon the Plaintiffs' Motion for Class Certification. Ala. R. Civ. P. 23(c)(1). The Court also finds that it has jurisdiction over the subject matter, the parties, and that venue is proper.

The Court is authorized to "make appropriate orders" under Rule 23(d)(1) for the conduct of class actions and to determine the course of the proceedings. The Court also is not bound by the class definition proposed by the Plaintiffs, and may adjust the definition and divide the class into subclasses, if needed. *Ex parte Hayes*, 579 So. 2d 1343, 1345 (Ala. 1991).

For the reasons stated below, the Motion for Class Certification shall be and hereby is GRANTED, and the class defined as follows shall be and hereby is CERTIFIED:

An opt-out plaintiff class as to Defendants, Shell Oil Company d/b/a Shell Chemical Company ("Shell") and Hoechst Celanese Corporation ("Celanese"), who are given notice in accordance with the due process clause of the U.S. Constitution and who are defined as follows:

> All persons and entities who presently own or who come to own before the end of the notice period or who previously have owned any improvements to real property or structures in the United States in which there is or was, during the time of such ownership, a polybutylene plumbing system or the components thereof which in whole or in part was manufactured, designed, supplied and/or contained raw materials sold by Shell and/or Celanese, provided, however, that the following persons and claims are excluded from the class:
>
> —All claims for personal injury;
>
> —Defendants, all manufacturers of polybutylene pipe, fittings, and/or components of polybutylene plumbing systems, and their parents, subsidiaries, affiliates, or controlled entities, and the officers, directors, agents, and employees of each of the foregoing;
>
> —All governmental entities, municipalities, and public or private water supply systems; and
>
> —All persons or entities who, as of May 26, 1995, have filed an individual non-class, polybutylene plumbing system lawsuit against Shell and/or Celanese, or are members of the class certified in the polybutylene plumbing system class action pending in San Diego County, CA, or are individuals represented by and who shall be identified in writing by the Houston, TX law firm of Fleming, Hovenkamp & Grayson, P.C. or the San Antonio, TX law firm of Montgomery & Associates,

P.C., except that these persons or entities may "opt-into" this class action by a filing with the Clerk no later than ten (10) days prior to the start of trial.

All persons or entities who come to own after the end of the class notice period but prior to trial any improvements to real property or structures in the United States in which there is or was, during the time of such ownership, a polybutylene plumbing system or the components thereof which in whole or in part was manufactured, designed, supplied and/or contained raw materials sold by Shell and/or Celanese, may "opt-into" this class action at any time by a letter or other document filed with the Clerk no later than ten (10) days prior to the start of trial.

The Court finds that the above class definition, which is substantially in the form proposed by Plaintiffs, is fair and just. The Court further finds that such a class exists and is reasonably ascertainable in this litigation. The Court notes that, if necessary, this class certification may be modified as the case proceeds, including the establishment of subclasses.

I. Introduction

The named Plaintiffs are adult residents from Greene County, Alabama, Texas, and Illinois who own or previously have owned improvements to real property or structures in the United States in which there is or was during the time of such ownership a polybutylene plumbing system, or the components thereof, which was manufactured, designed, supplied, and/or contained materials sold by Defendants. Plaintiffs bring this cause of action pursuant to common law for damages and other relief. Plaintiffs allege that Defendants have committed torts and engaged in wrongful conduct, including breaches of warranty, in connection with the development, design, manufacture, marketing, sale, and

distribution of polybutylene plumbing systems[1] and their components. Specifically, Plaintiffs allege that Defendants Celanese and Shell are liable at law for damages to the class members for allegedly defective polybutylene plumbing systems.

Plaintiffs have settled their claims on a classwide basis with the other Defendant, E. I. DuPont de Nemours and Company ("DuPont"). The Court has preliminarily approved that Settlement. *See* Order No. 1. In Order No. 1, the Court made preliminary findings that the elements of class certification were present for purposes of the DuPont settlement. The Court, however, in considering the pending Motion for Class Certification, has decided to base its decision only on the arguments and evidence submitted by the parties at the certification hearing, rather than rely on the Court's preliminary findings and conclusions in Order No. 1.

As noted, the Court recognizes that a class certification order "may be conditional, and may be altered or amended before the decision on the merits." Ala. R. Civ. P. 23(c)(1); *First Ala. Bank v. Martin*, 381 So. 2d 32 (Ala. 1980). Resolution of the Plaintiffs' Rule 23 class certification motion is committed to the sound discretion of the Court, and the decision will not be overturned except for abuse of discretion. *Marshall Durbin Co. v. Jasper Util. Bd.*, 437 So. 2d 1014, 1026 (Ala. 1983). Plaintiffs bear the burden of proof of establishing that all requirements of Rule 23 have been met. *Ex parte Blue Cross & Blue Shield of Ala.*, 582 So. 2d 469, 477 (Ala. 1991); *Rowan v. First Bank of Boaz*, 476 So. 2d 44, 47 (Ala. 1985).

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[1] Plaintiffs have defined "polybutylene plumbing systems" as follows: "they refer to and include water supply plumbing containing, among other things, pipes fabricated, in whole or in part, from polybutylene, and fittings, including tees, elbows, and couplings, fabricated in whole or in part, from Celcon and/or Delrin acetal copolymer, whether sold and/or installed as a system or separately."

An inquiry into the merits of Plaintiffs' causes of action is inappropriate when making the class certification decision. *Ex parte Gold Kist, Inc.*, 646 So. 2d 1339, 1343 (Ala. 1994). Indeed, the substantive non-class allegations of the Plaintiffs' complaint are taken as true for purposes of deciding the class certification. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 163 (1974). The Court, however, must make specific findings of fact as to the elements necessary for class certification, with Plaintiffs bearing the burden of persuasion. The Court notes that the Plaintiffs and Defendants, Shell and Celanese, have submitted substantial evidentiary materials and presented lengthy memoranda and arguments.

The Court finds it significant that in the *Beeman* case both Shell and Celanese agreed to a nationwide class certification in a Texas state court within the context of a settlement class. The only explanation provided to the Court by Shell and Celanese for their agreement to such in *Beeman* and their vigorous opposition to a nationwide class here was that *Beeman* was a settlement class.

This explanation is suspect at best. First, the same arguments made in opposition to certification here would be just as present in the context of a settlement, e.g., alleged unmanageability, atypicality of claims, differences in damages, and so on. Second, a court should determine on its own whether all the class action requirements are met, regardless of the parties' agreement, and should make specific findings. In requesting a settlement class in *Beeman*, Shell and Celanese were in effect asking that court to make the findings they do not want this Court to make. Finally, although invited by Plaintiffs' counsel to respond, neither Shell nor Celanese denied that they were attempting to settle their polybutylene problems on a nationwide class basis elsewhere.

Alabama Rule of Civil Procedure 23(a) sets forth prerequisites to *all* class actions. The requirements of Rule 23(a) are as follows: (1) the class is so numerous that joinder of all

members individually is "impracticable" [Rule 23(a)(1)]; (2) there are questions of law or fact common to the class [Rule 23(a)(2)]; (3) the claims or defenses of the class representative(s) are typical of the claims or defenses of the class [Rule 23(a)(3)]; and (4) the persons representing the class are able fairly and adequately to protect the interests of all members of the class [Rule 23(a)(4)].

After demonstrating that the Rule 23(a) requirements are satisfied and that an ascertainable class exists, Plaintiffs must *also* satisfy one or more of the elements enumerated in Rule 23(b) for maintaining the suit as a class action. *Eisen*, 417 U.S. at 163. The following element is particularly relevant to the present case: whether the questions of law or fact common to the class predominate over questions affecting the individual class members . . . and, on balance, a class action is superior to other methods available for adjudicating the controversy [Rule 23(b)(3)]. The Court will first analyze the Rule 23(a) requirements and later discuss Rule 23(b).

II. Rule 23(a) Requirements

A. Numerosity

The first requirement, numerosity, is satisfied if the proposed class is so numerous that joinder of all members is impracticable. Ala. R. Civ. P. 23(a)(1). "Impracticable" does not mean "impossible"; Plaintiffs need only show that it would be extremely difficult or inconvenient to join all members of the class. *In re Domestic Air Transp. Antitrust Litig.*, 677 F.2d at 698 (citing 3 Newberg, Newberg on Class Actions, § 18.03 at 455 (1985)). When the number of class members is large, as it is here, numerosity alone can establish impracticability and the Court need not look to other factors. *Finnan v. L.F. Rothschild & Co.*, 726 F. Supp. 460, 465 (S.D.N.Y. 1989); *Thillens, Inc., v. Community Currency Exch. Ass'n*, 97 F.R.D. 668, 676-77 (N.D. Ill. 1983). Geographic dispersion of those class members is another signifi-

cant factor in the numerosity determination. *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 878 (11th Cir. 1986); *Alvarado Partners, L.P., v. Mehta*, 130 F.R.D. 673, 675 (D. Colo. 1990); *Patrykus v. Gomilla*, 121 F.R.D. 357, 361 (N.D. Ill. 1988).

The Court finds that any argument against numerosity is without merit. First, the record demonstrates that there are as many as six million housing units containing a polybutylene plumbing system. This number was not rebutted or contested by Defendants at the certification hearing. Moreover, the affected housing units and class members are dispersed throughout several states. Obviously, joinder of all putative class members would be impracticable, and result in serious hardship and inconvenience, and likely be impossible. The Court finds that the number of units coupled with the great geographic dispersion satisfies the numerosity requirement of Rule 23(a).

B. Commonality

The second element of Rule 23, commonality, is satisfied if there are some questions of law or fact common to the class. Fed. R. Civ. R. 23(a)(2). Clearly, there are many common issues among class members. For instance, there are common, if not identical, issues of fact relating to the historical development, chemical composition, design, manufacture, and marketing of polybutylene plumbing systems and their raw materials and components, the content and veracity of Defendants' representations, Defendants' claims history, if and when Defendants had notice of a defect, Defendants' documents, the parties' expert testimony, the testimony of Defendants' employees, and the like. There are also numerous common issues of law, including whether Plaintiffs can meet their burden on the elements of their various causes of action, as well as discovery and evidentiary issues of law. The majority of Shell and Celanese's defenses also present issues of fact and law common to the entire class. Therefore,

the Court finds that Plaintiffs have made the required showing of commonality under Rule 23(a)(2).

C. Typicality

Rule 23(a)(3) requires that Plaintiffs demonstrate that the claims or defenses of the class representatives are typical of the claims or defenses of the class. That is, the named Plaintiffs' claims are typical if they arise from the same event, practice, or course of conduct that forms the basis of the class claims, and if they are based on same or similar legal theories. *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985).

The Court finds that the class representatives' claims arise from the same course of conduct by Defendants and the same nucleus of operative facts and are based on upon the same legal theories as those of the absent class members they seek to represent. The named Plaintiffs base their claims and the claims of those they seek to represent upon the wrongful and tortious conduct of Defendants as to polybutylene plumbing systems in general, and not as to a singular or specific system in an individual's housing unit. The Court finds that typicality is established because the class representatives must prove the same elements to establish their causes of action that the absent class members would need to prove to establish their causes of action if they brought individual claims against the Defendants. *In re South Central States Bakery Prods. Antitrust Litig.*, 86 F.R.D. 407, 416 (M.D. La. 1980). Accordingly, the typicality requirement for class members is satisfied.

D. Adequate Representation

The final requirement of Rule 23(a) is that the persons and counsel representing the class must be able fairly and adequately to protect the interests of all members of the class. Unquestionably, Plaintiffs are represented by qualified and competent counsel who will vigorously prosecute this action.

The Court is very familiar with the legal capabilities of Mr. Chestnut, Mr. Frazer, Mr. Whatley, Mr. Kuykendall, and Mr. Drake and find that their advocacy in this case and in other cases before this Court is and has been excellent.

Shell and Celanese, however, argue that Mr. Fleming is inadequate due to his representation of thousands of absent class members who are excluded by the class definition, as well as Mr. Fleming's opposition to the *Beeman* settlement class in Houston, Texas. These Defendants also contend that there is a conflict between the claims of Mr. Fleming's individual clients and the class members and that these supposed divergent interests prevent the same counsel from adequately representing the class.

The Court finds that there is no merit to these "inadequacy" arguments. Mr. Fleming and his law firm have an unblemished record of success in polybutylene plumbing litigation. His opposition to the *Beeman* settlement was motivated by his belief that the *Beeman* settlement was a "sweetheart deal" and thus unfair and inadequate for the class. He provided a very credible explanation for excluding his individual clients from the class, and the Court does not see any conflict in that regard, especially since Mr. Fleming represented that he may "opt-in" some or all of these clients through the "opt-in" provision suggested by the Plaintiffs. Additionally, Mr. Fleming's litigation performance in this case has been nothing but professional. The Court is convinced that Mr. Fleming will adequately and vigorously represent the class.

The test for adequacy of class representation focuses on whether the interests of the class representatives conflict with those of the class, and whether the class representatives will competently represent the interests of the class. *Sosna v. Iowa*, 419 U.S. 393, 403 (1975). Shell and Celanese's attempted attack on the merits of the named Plaintiffs' claims is not a subject for consideration at the class certification

stage. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). The Court finds that the named class representatives will fairly and adequately represent and protect the interests of all class members, and not put any perceived individual interests above those of the class.

The Court also finds that Celanese's argument, that some of the putative members may not have Celanese's product in their housing units, is without merit. With respect to numerosity, commonality, and typicality, Plaintiffs are not required at this stage to prove that all of the putative members of a class are actual members. *Carpenter v. Davis*, 424 F.2d 257 (5th Cir. 1970). It is noteworthy that the named Plaintiffs may be supplemented or replaced by others at any stage of the litigation. *In re Copley Pharmaceutical, Inc.*, 158 F.R.D. 485, 490 (D. Wyo. 1994).

Defendants also assert that the Plaintiffs are not typical or adequate representatives of absent class members due to differences in their damages. Courts have generally declined to consider conflicts or differences in damages as sufficient to defeat the adequacy requirement. *Blackie v. Barrack*, 524 F.2d 891, 909 (9th Cir. 1975). This is especially true when the class representatives and class members have a common interest in establishing liability against the defendants, as they certainly do here. Any conflict as to damages is merely theoretical at this point and is insufficient to defeat class certification. Accordingly, the Court is satisfied that Plaintiffs have established the adequate representation element of Rule 23(a)(4).

Accordingly, the named Plaintiffs are hereby appointed as class representatives to represent the class. Accordingly, the following attorneys are hereby appointed lead class counsel: J.L. Chestnut, Jr., T. Roe Frazer II, Joseph R. Whatley, Jr., Frederick T. Kuykendall III, George M. Fleming, and R. Jackson Drake.

For the foregoing reasons, the Court finds that Plaintiffs have satisfied each of the four requirements of Rule 23(a).

III. Rule 23(b) Requirements

After establishing that the requirements of Rule 23(a) are satisfied and that an ascertainable class exists, Plaintiffs must also satisfy one or more of the elements enumerated in Rule 23(b).

The Plaintiffs seek certification pursuant to Rule 23(b)(3) which requires that common questions predominate over individual questions and that a class action be the superior method of adjudicating the controversy. The Court finds that the questions of law and fact common to the members of the class predominate over any questions affecting only individual members. The issues affecting individual members pale in comparison to the numerous questions of law and fact common to all class members. That there may be some differences in applicable law and damages can be taken care of through a properly drafted case management order and/or jury charge.

Defendants argue that this class action would be unmanageable because proof of injury will require a multitude of individualized examinations. The Court is not persuaded that this case will require "mini-trials" on the issue of damages. The class action is not unmanageable. Proof of liability in this case can be established through common evidence, and damages can be proven largely using objective data and will not involve thousands of separate "mini trials" involving lengthy individual examinations of numerous class members. Furthermore, as the court held in *In re Asbestos School Litigation*, 104 F.R.D. 422, 432 (E.D. Pa. 1984), *aff'd in part, vac'd in part on other grounds*, 789 F.2d 996 (3d Cir. 1986), "the 'overwhelming weight of authority' holds that the need for individualized damages calculations does not diminish the appropriateness of class certification where com-

mon questions as to liability predominate." Several courts have certified nationwide class actions presenting much more challenging manageability issues than this case. *See, e.g., In re School Asbestos Litig., supra; Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir. 1986); *In Re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677 (N.D. Ga. 1991). In *In Re Domestic Air Transp. Antitrust Litig.*, for example, the court certified a class action involving millions of class members and over 400 million transactions. 137 F.R.D. at 693.

Finally, the Court must determine whether the class action is the superior method of dealing with this controversy. If the question is close, courts should err in favor of class certification in order to protect the judicial system from repetitive litigation. There is no real question that a class resolution is much more favorable than individual trials which would be grossly repetitive of the common issues of fact, law, and liability.

The Court finds that if the class is not certified it is possible that many claims will not be pursued because the costs will exceed the possible recovery and because many class members may never know of their potential claims. Accordingly, the Court finds that a class action is a superior method of adjudicating this controversy for many good reasons, including: (1) any interest of class members in individually controlling the prosecution of separate actions is outweighed by the comprehensiveness and speedy resolution of this class action; (2) the number and type of individual lawsuits commenced by members of the class have failed to result in relief to the overwhelming majority of class members, even in spite of the successful nature of that litigation; (3) it is desirable to concentrate the litigation of the claims in one forum; and (4) the Court foresees no peculiar or insurmountable difficulties likely to be encountered in the management of this class action.

The Court further finds that Plaintiffs have satisfied the requirements of Rule 23(b)(l)(A), as there is a risk that separate actions will be brought if a class action is not permitted. Numerous class actions have been filed in other states, and there will likely be more filed as well as numerous individual actions if a class action were not certified in this case. This likely would lead to the Defendants being exposed to inconsistent and varying adjudications, and potential incompatible standards of conduct.

IV. Notice

The Plaintiff's counsel are directed to provide the Court with a proposed notice, proposed notice plan, and proposed notice order as soon as is practicable following the entry of this Order. The notice and notice plan must be consistent with Rule 23, Alabama law, and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

The Court has not been cited to enough authority to justify requiring Shell and Celanese to pay for the notice. The Court thus finds that Plaintiffs and/or Plaintiffs' counsel shall be responsible for paying for the notice and a ensuring that the notice is disseminated in accordance with the notice plan to be approved by the Court. The Court, however, finds that in the interest of resource conservation the notice of this class certification, in Plaintiffs' counsel's discretion, may be included in and incorporated into the notice to be disseminated of the DuPont settlement.

V. Conclusion

For the foregoing reasons, it is ORDERED that Plaintiffs' Motion for Class Certification is GRANTED and the class defined hereinabove is CERTIFIED.

IT IS FURTHER ORDERED that Shell and Celanese's separate motions to strike shall be and hereby are denied.

IT IS FURTHER ORDERED that Shell and Celanese's motions and requests to continue and/or adjourn the certification hearing are DENIED as moot.

IT IS FURTHER ORDERED that Shell's motion to reconsider Order No. 1 preliminarily approving the DuPont settlement shall be and hereby is DENIED.

SO ORDERED, this 30th day of June, 1995.

/s/ Eddie Hardaway, Jr.
EDDIE HARDAWAY, JR.
CIRCUIT COURT JUDGE

APPENDIX B

IN THE CIRCUIT COURT OF
GREENE COUNTY, ALABAMA

[Filed Nov. 17, 1995]

Case No. CV-94-074

GARRIA SPENCER, *et al.*, Individually and on Behalf of all Others Similarly Situated,

Plaintiffs,

v.

SHELL OIL COMPANY d/b/a SHELL CHEMICAL COMPANY; HOECHST CELANESE CORPORATION; E.I. DU PONT DE NEMOURS AND COMPANY,

Defendants.

ORDER FINALLY APPROVING CLASS ACTION SETTLEMENT AGREEMENT AND DISMISSING CLASS ACTION WITH PREJUDICE AGAINST E. I. DU PONT DE NEMOURS AND COMPANY

The motions of class counsel and defendant E. I. du Pont de Nemours and Company ("DuPont") for final approval of class action settlement ("DuPont Settlement") was heard this 17th day of November, 1995.

1. Garria Spencer, et al. instituted this Action by Complaint dated November 16, 1994, individually and on behalf of others similarly situated, against DuPont and other defendants claiming that defendants were liable for alleged defects in polybutylene plumbing systems. On May 4, 1995 plaintiffs and DuPont executed a Settlement Agreement and Stipulation dated June 27, 1995 which provide for settlement of this Action and an order dismissing this Action with prejudice, subject to approval of this Court. On May 12,

1995, class counsel and DuPont filed a joint motion for preliminary approval of the DuPont Settlement. Under the terms of that Settlement, DuPont agreed to reimburse homeowners for eight percent of the cost of replacement of their polybutylene plumbing system and eight percent of unreimbursed property damage. DuPont agreed to pay this amount without regard to whether a class member has yet suffered a leak in their polybutylene plumbing system; regardless of when the plumbing system was installed; and regardless of whether the plumbing system contains any of DuPont's acetal resin, Delrin.

2. After conducting a hearing, on May 25, 1995, the Court issued its Order Granting Preliminary and Conditional Approval of the DuPont Settlement.

3. Thereafter, notice in a form approved by the Court was disseminated to the class. The notice was sent via first class and by means of a massive national media campaign.

4. The Court ordered deadline to opt out of the DuPont Settlement expired on October 27, 1995. The Court ordered deadline to file objections to the DuPont Settlement expired on October 27, 1995.

5. The Court has been informed that, based upon negotiations occurring subsequent to the dissemination of the notice to the class, DuPont has agreed to raise its percentage contribution to the class for replumbs and damages from eight percent to ten percent. No other significant terms of the DuPont Settlement affecting the rights of the class have changed.

NOW THEREFORE, IT IS ORDERED:

6. The Settlement Agreement between Plaintiffs, on behalf of themselves and as representatives of the Settlement Class (as defined in paragraph 8 hereof) , and DuPont dated May 4, 1995, as subsequently modified by stipulation, is fair, ade-

quate and reasonable to the Plaintiffs, the members of the class, and DuPont. The Settlement Agreement is hereby formally approved in all respects and the parties are hereby ordered to consummate and perform its terms.

7. The Court finds that the form of notice satisfies the requirements of Rule 23 of the Alabama Rules of Civil Procedure and the Due Process Clause of the Fourteenth Amendment in that it fairly and accurately described the pending Action and the DuPont Settlement. The notice advised class members of their right to be excluded from the class and that those who do not timely request exclusion would be bound by the judgment. The notice also advised the class members of their right to enter an appearance through counsel and the right to object to the DuPont Settlement. Based upon the affidavit of Wayne L. Pines and those of class counsel, the Court finds that the means of disseminating the notice was the best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the Action and their rights therein.

8. All conditions to the DuPont Settlement have been met. The Court, therefore, removes the conditional nature of its certification of the class and hereby enters a binding, final certification of a plaintiff settlement class ("Settlement Class") consisting of the following:

> All persons and entities who own or who previously owned or will own any improvements to real property or structures in the United States in which there is or was during the time of such ownership, a polybutylene plumbing system with plastic insert fittings made of acetal resin ("polybutylene plumbing system").

Excluded from the Class are:

> a. All persons who, in accordance with the terms of the Settlement Agreement and the Notice to the Class, have executed and mailed or submitted a timely request for exclusion from the Class;

b. The defendants, any and all manufacturers of polybutylene pipe, fittings and/or components of any and all polybutylene plumbing systems, the parent and any subsidiary, affiliate, or controlled entity of any of them, and the officers, directors, agents, and employees of each of them; all persons that have only yard lines as opposed to a polybutylene plumbing system;

c. All persons who as of May 12, 1995: (i) have pending an individual non-class lawsuit against DuPont in connection with a polybutylene plumbing system, (ii) are members of a class certified against DuPont in any polybutylene plumbing system class action lawsuit, (iii) are individual claimants represented by the Houston, Texas law firm of Fleming, Hovenkamp & Grayson, P.C.; or (iv) members of the certified class in San Diego County, California;

d. All persons who have previously executed a release in favor of DuPont regarding polybutylene plumbing systems;

e. All persons who had replumbs done before May 12, 1995, unless the homeowners was not fully reimbursed for the cost of such replumb;

f. All governmental entities, municipalities, commercial systems, and persons having yard line systems only; and

g. Any and all claims for personal injury or wrongful death.

9. Upon execution of this Order and by Order of this Court, plaintiffs and each other member of the Settlement Class, on behalf of themselves and their respective parents, subsidiaries, affiliates, related entities, successors and/or assigns, and their past, present, and future agents, representatives, servants, partners, executors, administrators, assigns, predecessors, successors, descendants, dependents, and heirs, shall be deemed to have fully released and forever discharged

DuPont, its parents, subsidiaries, affiliates, retailers, dealers, distributors, along with all of their respective past and present parents, subsidiaries, joint ventures, related entities, affiliates, present and former directors, officers, consultants, agents, stockholders and employees (who individually and collectively shall be referred to as the "Released Parties"), from any and all claims, demands, actions, causes of action, costs losses and suits of every kind and nature whatsoever which the plaintiffs or any member of the Settlement Class may now have or may have had at any time heretofore or may have at any time hereafter, whether known, unknown, foreseen, unforeseen, patent or latent, from the beginning of time to the date hereof, arising from, resulting from, or in any manner relating to any matter relating to polybutylene plumbing systems; and, more particularly, but without in any way limiting the generality of the foregoing, the plaintiff and each member of the Settlement Class will be deemed to have released, remised, and forever discharged the Released Parties of and from any and all claims asserted by the plaintiffs or that could have been asserted by the plaintiffs, and any and all claims related to any claims asserted by the plaintiffs or that could have been asserted by the plaintiffs, in the above-captioned action (collectively the "Released Claims").

10. Upon execution of this Order and by Order of this Court, DuPont, its parents, subsidiaries, affiliates, retailers, dealers, and distributors, along with all of their respective past and present parents, subsidiaries, joint ventures, related entities, affiliates, past and present and former directors, officers, consultants, agents, stockholders and employees (the Released Parties) are forever discharged from any and all claims, demands, actions, causes of action, costs, losses and suits of every kind and nature whatsoever which the plaintiffs or any member of the Settlement Class may now have or may have had at any time heretofore or may have at any time hereafter, whether known, unknown, foreseen, unforeseen, patent or latent, from the beginning of time to the date hereof,

arising from, resulting from, or in any manner relating to any matter relating to polybutylene plumbing systems.

11. Actual Class Members or those who thought they may be class members who have validly and timely requested exclusion may pursue their own individual remedies, if any.

12. The plaintiffs and all other members of the Settlement Class are hereby enjoined and prohibited from commencing or participating in any action, either directly, individually, representatively, or in any capacity, against any Released Party arising from, resulting from or in any manner relating to polybutylene plumbing systems or the subject of the above-captioned Action.

13. All parties and non-parties are hereby enjoined and prohibited from commencing or participating in any action, either directly, individually, representatively, or in any capacity, against any Released Party arising from, resulting from or in any manner relating to polybutylene plumbing systems that are or could have been the subject of the above-captioned Action.

14. No further notice of the DuPont Settlement or the approval thereof is required.

15. The Court reserves jurisdiction, without affecting the finality of this Order, over: (a) implementation of this Settlement Agreement (b) enforcing and administering this Order as against any of the Settling Parties or Settlement Class Members, (c) enforcing and administering the Settlement Agreement, including any releases in connection therewith; and (d) other matters related or ancillary to the foregoing.

IT IS SO ORDERED, this 17th day of November, 1995.

/s/ Eddie Hardaway
EDDIE HARDAWAY
CIRCUIT JUDGE EDDIE HARDAWAY